IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 456 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NAVINKUMAR ALIAS SHAMBHUPRASAD ALIAS BAPJI CHIMANLAL VYAS - Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MR DEVANG T SHAH WITH MR.JAYESH DAVE for Appellant
MR KT DAVE, A.P.P. for Respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 26/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

Present appeal filed under Section 374(2) of the

Code of Criminal Procedure, 1973, questions legality of judgment dated January 19, 2000, rendered by the learned Special Judge & Additional Sessions Judge, Mehsana Camp at Patan, in Special N.D.P.S.Case No.2 of 1999, by which the appellant is convicted under Sections 15, 20, 21 & 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (“the Act” for short) and sentenced to suffer R.I.for ten years and fine of Rs. 1 Lakh, in default, S.I. for three years, for each of the offences.

2. The short facts giving rise to the present appeal are as under :

Mr.Dashrathsinh Joravarsinh Vaghela, Police Sub-Inspector, Rapid Response Cell, Gandhinagar, received an information on 8.10.1998 that person named Navinkumar alias Shambhuprasad alias Shambhu-maharaj Chimanlal Vyas, residing at Rangfali Rudra Mahalay, near Rudra Mahalay Sidhpur, was dealing in ganja/charas etc. On receipt of the information, he reduced the same into writing. He went to Sidhpur Rest House and requisitioned services of two panch witnesses and returned to Sidhpur Police Station. The first part of panchnama was drawn at Sidhpur Rest House. Thereafter, the raiding party along

with panch-witnesses went to the place mentioned in the information received by Mr.D.J.Vaghela in a government vehicle. On reaching the place situated in Rangfali, Rudra-mahalay Maholla, PSI Mr.Vaghela called out name of the appellant, as a result of which, one person came down from first floor of the house. He was interrogated by PSI Mr.Vaghela and on being asked, the person stated that his name was Navinkumar alia Shambhuprasad alias Shambhu-maharaj Chimanlal Vyas (i.e. the appellant). PSI Mr.Vaghela introduced himself to the appellant and informed the appellant that an information was received that he was dealing in charas and ganja and, therefore, it was necessary to search his house. The panch-witnesses, who were members of the raiding party, were also introduced to the appellant. Before effecting search of the house of the appellant, Mr.Vaghela offered the appellant to search his house in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by the appellant. Thereupon, the house belonging to the appellant, consisting of three rooms, was searched, which resulted into find of ganja, charas, poppy husk and 22 packets of Madhu-Munakka tablets containing psychotropic substance, namely, Tetrahydroc Anna Bional. Mr.Vaghela demanded from the appellant pass or permit authorising

him to possess ganja, charas and psychotropic substance, but none could be produced by the appellant. Samples of 250 grams of ganja, 250 grams of poppy husk, 20 grams of charas, and the tablets of madhu-munakka, were drawn and sealed to be sent to F.S.L. for detailed analysis. The second part of panchnama was drawn. The samples were sent to F.S.L. for the purpose of detailed analysis. The appellant and his wife, who was also present in the house were arrested. PSI Mr.Dasharathsinh J.Vaghela lodged complaint against the appellant and his wife, and forwarded his complaint, muddamals, panchnama etc. with the accused to Police Inspector, Sidhpur Town Police Station. Necessary investigation into complaint of Mr.Vaghela was made by Mr.Nanjibhai Surjibhai Ninama of Sidhpur Police Station. On receipt of the report from F.S.L., which indicated that the substances seized from the possession of the appellant were narcotic drugs and psychotropic substance within the meaning of the Act, the investigating officer submitted charge-sheet in the Court of learned Special Judge, Mehsana, on the basis of which Special N.D.P.S.Case No.2 of 1999 was registered against the accused.

3. The learned Special Judge framed charge against the

two accused at Exh.18 for commission of offences punishable under Sections 15, 20(b), 21 & 22 of the Act. The charge was read over and explained to them, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Police Constable Dilipsinh Mafaji Vaghela as PW.1 at Exh.21, (2) PSI R.R.Cell Mr.Dasharathsinh Joravarsinh Vaghela as PW.2 at Exh.26, (3) Panch Rajeshkumar Khanchandbhai Rathod as PW.3 at Exh.38, (4) Panch Nanjibhai Bijalbhai Raval as PW.4 at Exh.40, (5) Panch Shantiji Madarji Thakor as PW.5 at Exh.41, (6) Bhupatji Ghemarji Thakor as PW.6 at Exh.43, (7) Unarmed Head Constable Kirtisinh Pratapsinh Chauhan as PW.7 at Exh.45, (8) Shantilal Bhavarlal Shah as PW.8 at Exh.49, (9) Investigating Officer Mr.Vikramsinh Shivsinh Raol as PW.9 at Exh.51, (10) Devendrakumar Haribhai Desai, P.S.O. of Sidhpur Police Station as PW.10 at Exh.52, (11) Assistant Director of F.S.L. Dr.Mohindersing Jogeram as PW.11 at Exh.54, (12) Markan Kantilal Pathak as PW.12 at Exh.59, (13) Investigating Officer Mr.Ambuji Ramaji Bhati as PW.13 at Exh.61, (14) Prabhudas Ramgopal Sharma as PW.14 at Exh.62, and (15) Investigating Officer Nanjibhai Surajibhai Ninama as PW.15 at Exh.63, to prove its case against the accused. The prosecution also produced

documentary evidence such as; entry made in the station-diary at Exh.27, complaint lodged by Mr.D.J.Vaghela at Exh.28, report forwarded to P.I. Sidhpur Police Station by PSI R.R.Cell, Gandhinagar Range at Exh.29, resolution passed under Section 42 of the Act at Exh.30, seizure-memo served on accused at Exh.31, arrest-memo at Exh.32, original slips bearing signatures of panch-witnesses at Exhs.34 to 37, letter written by P.I. Sidhpur Police Station to Director of F.S.L. requesting him to accept muddamal sent through Kirtisinh at Exh.46, note which was sent to F.S.L. by R.R.Cell, Gandhinagar Range, Gandhinagar at Exh.47, letter written by Assistant Director, F.S.L. to P.I.Sidhpur Police Station at Exh.48, certificate given by Shantilal Bhavarlal Shah, who weighed the muddamal articles, at Exh.50, report of F.S.L. for having received muddamal for analysis at Exh.55, report of analysis at Exh.60 etc., in support of its case against the accused.

4. After recording of evidence of prosecution witnesses was over, the learned Special Judge explained to the accused the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code

of Criminal Procedure, 1973. In their further statements, the accused claimed that they were innocent. The appellant stated that he was running a Tea-Stall in Mandi-Bazar, Sidhpur and as he had refused police personnel to serve tea free of cost, a false case was foisted upon him. However, no defence evidence was adduced by any of the accused.

5. On appreciation of entire oral evidence as well as documentary evidence led by the prosecution, the learned Judge of the trial Court held that it was proved by the prosecution that ganja, poppy-husk, charas, and 22 packets of madhu-munakka tablets containing psychotropic substance were found from the house, which was in possession of the appellant. The learned Judge further held that the appellant was dealing in charas, ganja, poppy-husk and madhu-munakka tablets containing Tetrahydroc Anna Bional, which is one of the psychotropic substances specified in the Act, and committed offences punishable under Sections 15, 20(b), 21 & 22 of the Act. The learned Judge of the trial Court also held that all the mandatory provisions contained in the Act were complied with. In view of aforesaid conclusions, the

learned Judge has convicted the appellant under Sections 15, 20, 21 & 22 of the Act and imposed sentences referred to earlier by judgment dated January 19, 2000, giving rise to instant appeal. It may be mentioned that the learned Judge has acquitted the original accused no.2, who is wife of the present appellant, on the ground that there was breach of provisions of Section 50(4) of the Act, and her acquittal is not questioned by the State before this Court.

6. This Court has heard Mr.Devang T.Shah & Mr.Jayesh Dave, learned advocates of the appellant, as well as Mr.K.T.Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

7. The prosecution case is that Mr.D.J.Vaghela, PSI, R.R.Cell, Gandhinagar Range, Gandhinagar, had raided house of the appellant, which resulted into find of poppy straw, prepared opium, poppy husk, psychotropic substances etc. Mr.Vaghela is neither a Gazetted Officer,

nor empowered officer under Section 41(2) of the Act. Therefore, the provisions of Section 42 of the Act would apply to the facts of the case. There is no manner of doubt that it was his duty to comply with the provisions of Section 42 of the Act. The evidence on record shows that he had reduced the information received by him into writing, which is quite evident from the contents of Exh.27. However, the record does not show that he had forwarded the report contemplated by Section 42(2) of the Act to his immediate official superior. In fact, in Para-20 of his deposition, P.S.I. Mr.Vaghela has, in terms, admitted that except reducing the information into writing by making an entry in the Station Diary, he had not informed any officer of his department about the receipt of the information. Mr.K.T.Dave, learned A.P.P. for the State, could not satisfy the Court that the report as envisaged under Section 42(2) of the Act was forwarded by PSI Mr.D.J.Vaghela to his immediate official superior. Thus, there is no manner of doubt that mandatory provisions of Section 42(2) of the Act were not complied with. By catena of decisions of the Apex Court, it is well settled that non-compliance of the provisions of Section 42(2) of the Act would entitle accused to acquittal because of inbuilt prejudice resulting from

non-compliance of the said provisions. Therefore, instant appeal deserves to be accepted on this short ground.

8. However, the record further shows that the muddamal samples were not properly sealed as required by law. The testimony of PSI Mr.D.J.Vaghela read with other evidence produced on record of the case, would indicate that slips bearing signatures were not affixed on any of the muddamal samples at all, but, were kept loose and the original slips bearing signatures of panch-witnesses have been produced on record of the case at Exhs.34 to 37. The correct procedure of sealing muddamal is enumerated by three decisions of this Court, namely: (1) Chandrakant Nagindas Modi v. State of Gujarat, 1989(I) F.A.C.153; (2) Unreported decision dated August 17, 2001 rendered by the Division Bench comprising B.C.Patel (as he then was) & A.L.Dave,JJ., in Criminal Appeal No.323 of 1996 filed by Jitendra alia Sanjaykumar Surykant Desai against State of Gujarat, and (3) decision dated May 7, 2002 rendered by the Division Bench comprising Kshitij R.Vyas & Ravi Tripathi,JJ in Criminal Appeal No.287 of 1999 filed by Ganpatram Punmaram Vishnoi against State of Gujarat. As per law laid down by this Court, the slips bearing signatures of the panch-witnesses should be affixed on

samples and thereafter seals should be applied so that if any attempt is made to tamper with the sample, the slips affixed would get torn. On reappreciation of evidence, this Court is satisfied that correct and fool-proof procedure of sealing was not resorted to by Mr.Vaghela and possibility of tampering with muddamals was not ruled out at all. This deficiency will have to be evaluated in the light of other discrepancies brought on record of the case. The case of the prosecution is that samples of 250 grams of ganja, 250 grams of poppy husk, 20 grams of charas, 649 tablets of madhu-munakka containing psychotropic substance were sent to F.S.L. for detailed analysis. The report of analysis indicates that sample of ganja was weighing 225 grams instead of 250 grams, whereas sample of poppy-husk was weighing 236 grams instead of 250 grams and sample of charas was weighing 17.5 grams instead of 20 grams and 653 muddamal tablets, having psychotropic substance, were received by F.S.L. for analysis instead of the fact that total number of tablets seized was 649. This discrepancy is not explained by any of the witnesses examined by the prosecution. This discrepancy has to be viewed in the light of the defective procedure adopted by P.S.I. Mr.Vaghela at the time of sealing muddamal articles. Therefore, it is not

satisfactorily explained by the prosecution that the muddamal samples were sealed in such a manner so as to rule out tampering of the same before it reached F.S.L. On this ground also, the appellant is entitled to get benefit of reasonable doubt. On review of evidence led before the trial Court, this Court is of the opinion that it is difficult to sustain conviction of the appellant and the appeal will have to be allowed.

For the foregoing reasons, the appeal succeeds. Judgment dated January 19, 2000 rendered by the learned Special Judge & Additional Sessions Judge, Mehsana Camp at Patan, in Special N.D.P.S. Case No. 2 of 1999 convicting the appellant for commission of offences punishable under Sections 15, 20, 21 & 22 of the N.D.P.S.Act, 1985 and sentencing him to R.I. for ten years and fine of Rs.1 Lakh, in default, S.I. for three years, for commission of each offence, is hereby set aside. Instead, the appellant is acquitted. The respondent is directed to release the appellant from jail forthwith unless his presence in jail is needed with reference to any other case. The muddamal be disposed of in terms of directions given by the learned Judge in the impugned judgment.

[J.M.PANCHAL,J.] [H.B.ANTANI,J.]